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IN THE

Supreme Court of the United States

October Term, 1971

No. 1883

HY-LAN FURNITURE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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HY-LAN FURNITURE, INC.,

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v.

NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Hy-Lan Furniture, Inc. ("Company") petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit entered in this cause on March 10, 1971 (rehearing denied April 1, 1971) and the enforcement decree of the said Court entered on April 7, 1971.

Opinions Below

The Trial Examiner's decision, rendered June 30, 1969, is reproduced herein at Appendix A. The decision of the National Labor Relations Board ("Board") is reported at 180 NLRB No. 57 (December 16, 1969) and is reproduced herein at Appendix B. The Board applied for enforcement of the order on August 19, 1970. The decision of the Court

of Appeals granting enforcement without opinion is officially reported at 437 F.2d 1356 (March 10, 1971) and is reproduced herein at Appendix C. A timely petition for rehearing *en banc* was filed, which petition was denied on April 1, 1971 (Appendix D). A decree was entered on April 7, 1971 enforcing the Board's order (Appendix E).

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

(1) Does an order directing an employer to bargain with a minority union violate the employees' right under the National Labor Relations Act to be represented by a labor organization of their choice where: a) the employer's withdrawal of recognition is based upon a written rejection of the union by a majority of the employees; b) the withdrawal of recognition occurs after the initial certification year has expired; c) the Trial Examiner and the Board have found, and the union admits, that for several months prior to withdrawal of recognition the employer has bargained in good faith; and d) there is no evidence that the employer has engaged in any conduct violative of the Act at any time during the six months prior to the filing of the unfair labor practice charge?

(2) May the Board, consistent with the principles announced by this Court in *Brooks* v. *NLRB* and *Garment Workers* v. *NLRB*, apply the Board-created "extension of the certification year" doctrine to compel an employer to continue to bargain with a minority union where: a) the employer has already bargained for more than a year after the union's certification; and b) there is no finding or evidence that the employer has caused the union's loss of majority?

(3) Does the decision herein of the Fourth Circuit Court of Appeals violate this Court's decision in *Machinists' Local 1424* v. *NLRB* and conflict with the decision of the Sixth Circuit Court of Appeals in *NLRB* v. *Electric Furnace* which latter case holds, on facts indistinguishable from those at bar, that an employer will not be required to bargain with a minority union after the expiration of the certification year where there has been no unfair labor practice committed by the employer during the six-month period prior to the filing of the unfair labor practice charge?

The Board ordered the Company to bargain with the minority union. The Court of Appeals enforced the Board's order without opinion.

Statutes Involved

The statutes involved are Sections 7, 8(a)(1), 8(a)(5), and 10(b) of the National Labor Relations Act, as amended (also cited as 29 U.S.C. §§ 157, 158(a)(1), 158(a)(5), 160(b)). The said statutes are printed herein at Appendix F.

Statement of the Case

On January 2, 1968, the Board certified the Upholsterers' International Union of North America, AFL-CIO ("Union") as representative of the production and maintenance employees at the Company's plant in Hickory, North Carolina (A3a, A21a).*

Bargaining sessions were held throughout the year in February, April, May, July, September, October, November, and December, 1968. Another bargaining session was held in January, 1969. The parties reached agreement on many matters.

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*"A" references are to the appendices printed herein.

On February 20, 1969 (thirteen and one-half months after certification), recognition was withdrawn by the Company on the basis of a written, informal petition to decertify the Union (A3a, A10a, A16a). The petition, signed by well over a majority of the employees, stated:

> "We, the undersigned employees of Hy-Lan Furniture Incorporated no longer want U.I.U. to represent us as our Bargaining Agent."

A formal petition for decertification was filed four days after recognition was withdrawn (A10a). The Union thereafter filed the unfair labor practice charge herein which operated to stay the decertification proceeding* (A10a, n. 4).

The affidavit of the Union official in support of its unfair labor practice charge recites in detail the substantial progress made at the bargaining sessions and the numerous matters on which agreement had been reached. The affidavit alleges no wrongful conduct other than the Company's refusal to bargain after February 20, 1969.

In contrast to the Union's affidavit, the Board's complaint and the findings below do not rest primarily on the February 20 refusal to bargain. Rather the complaint adds an allegation nowhere suggested by the Union's affidavit: to wit, an alleged refusal subsequent to August 28, 1968, "to furnish . . . complete and accurate job classifications and rates of pay." The August 28 date is a critical date. It is six months prior to the filing of the charge (A3a, n. 1) and is the date prior to which no unfair labor practice may be alleged. This date is referred to herein as the "statutory cut-off date."**

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* The decertification proceeding was dismissed on December 30, 1969 on the ground that the Trial Examiner's decision herein ordering that the Company bargain with the minority union was dispositive of all issues raised in the said decertification proceeding.

** Under Section 10(b) of the National Labor Relations Act, the Board is barred from alleging any unfair labor practice which has occurred more than six months prior to the filing of the unfair labor practice charge.

The Board's allegation of refusal to supply information has no factual support. It is undisputed that a complete list of rates of pay for all the employees had been in fact furnished to the Union (A5a). As for job classifications, it was stipulated at the hearing that the establishment of such classifications was a subject of collective bargaining, and that classifications were to be "furnished to the Union within thirty (30) days from the signing" of a contract. (See also A4a).

A careful analysis of the undisputed facts demonstrates that the Board's allegation of refusal to furnish information was improperly used to justify the order compelling the Company to bargain with a minority union.

Good Faith Bargaining and Furnishing of Information

On January 3, 1968, the Union requested by letter the names of employees, dates of hire, job classifications, rates of pay, and information relating to the Company's retirement and insurance plan (A4a). The request for job classifications was made, notwithstanding the fact that on the previous day the Union had demanded that the establishment of such classifications be a subject of collective bargaining (A4a). The foregoing requests were repeated twice prior to March, 1968 (A4a) at which time the Union filed an unfair practice charge not involved herein. That charge alleged a refusal by the Company to furnish information necessary to bargain (A5a), and was finally withdrawn in January, 1969.

In May, 1968 the Company supplied the Union with the names of employees, their rates of pay, and dates of hire (A4a). The Company informed the Union that job classifications were not maintained (A5a). There is no evidence in the Record that such classifications had ever been established for purposes of collective bargaining and labor relations, though the Company had, on occasion, categorized the employees for other purposes.

Between early May and August 28, 1968 (the statutory cut-off date), the Union met and negotiated with the Company two times (A5a). There is no evidence that any further requests for information were made regarding wage rates and job classifications. The same is true with respect to the negotiating session held on September 10, 1968.

The only time after the beginning of May that the Union requested any information as to wages or job classifications was at a bargaining session with a new lawyer for the Company on October 31, 1968. The Union's request for an updating of prior information was in response to the *Company's* inquiry as to what information the Union desired (A7a). By the very next meeting, on November 25, the Union had received all the information it had previously requested (including job descriptions) except for the rates of pay and dates of hire * of employees who had commenced employment with the Company between early May and November 25 (A8a).

At no time after November 25 did the Union in any way suggest or state that it had received incomplete information on November 25 (A14a-A15a). Nor did the Union make further requests for additional information (A14a). The Trial Examiner noted that these facts "indicated" that the Union "did not feel at the time that the lack of fresh wage data impeded the Union at that stage of the bargaining" (A15a). Further indication of the Union's satisfaction with the information supplied by the Company was the Union's request, on January 8, 1969, that the prior unfair labor practice charge against the Company be withdrawn. The request was granted, the Trial Examiner in said prior proceeding noting that "substantial progress toward reaching an agreement had been made" (A8a-A9a).

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* It is to be noted that the complaint herein did not allege any failure to supply dates of hire.

There is unanimous agreement among the Union, the Trial Examiner herein and the Board that from the time the Company's new attorney came onto the scene in October, 1968, the Company bargained in good faith and substantial progress was made in the negotiations.

The Trial Examiner specifically found (which finding was upheld by the Board) that for several months prior to the withdrawal of recognition "Respondent admittedly bargained in good faith" and that "considerable progress [was made] in their negotiations" (A16a).

The good faith bargaining of the Company was also demonstrated by the Union's own admission when it requested withdrawal of the former charges and by Mr. Woodall's (the Union representative) testimony as to the progress made in the bargaining:

> "Substantial progress was made. Mr. Smith began giving us counter-proposals, and we began to bargain, after Mr. Smith came on the scene on October 31, 1968."

Woodall categorically stated that agreement had been reached "on a good many of the proposals that the Union had made."

As to the charge of refusal to bargain after February 20, 1969, it is admitted that no bargaining occurred after the Company learned, one and one-half months after the end of the initial certification year, of the employees' written petition rejecting the Union.

In respect of the charge of refusal to supply information, the Record is undisputed that the only request for such information subsequent to August 28, 1968 (the statutory cut-off date) occurred on October 31, 1968; that said request was met in all material respects on November 25, 1968; and that no objections or requests for further information were made thereafter. The Trial Examiner

specifically noted that these facts "indicated" that the Union was not "impeded" in its bargaining (A15a).

Notwithstanding these undisputed facts and findings, and notwithstanding the Company's good faith and the reasonable basis for the Company's withdrawal of recognition, the Board on review (and after affirming these findings) held: "(1) Respondent failed and refused to supply data necessary for meaningful and intelligent bargaining," and (2) the Company improperly refused to bargain with the Union.

The Board issued a cease and desist order which, among other things, directed the Company to bargain with the Union—a union which represented only a minority of the employees and which a majority had expressly rejected. As a result of this order, the employees' decertification petition was dismissed.

Reasons for Granting the Writ

The Board's order, as enforced, directing the Company to bargain with a minority union departs from the decisions of this Court holding paramount the right of employees, guaranteed under the Act, to bargain collectively through a freely chosen *majority* representative. *Garment Workers* v. *NLRB*, 366 U.S. 731 (1961); *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 339 (1944). As stated in *Garment Workers* at 737:

> "In their selection of a bargaining representative, § 9(a) of the Wagner Act guarantees employees freedom of choice and majority rule."

The instant case deals specifically with the question of whether the Board may circumvent the majority-rule mandate of our national labor policy through a construction of the Act which violates the six-month statute of limitations provision of the Act, violates this Court's deci-

sion in *Machinists' Local 1424* v. *NLRB*, 362 U.S. 411 (1960), and conflicts with the decision of the Sixth Circuit in *NLRB* v. *Electric Furnace Co.*, 327 F.2d 373 (1964).

The case at bar also raises the issue of whether the Board erroneously applied to this case the so-called "extension of the certification year" doctrine, a radical doctrine which has never been examined or approved by this Court and which, as applied here, has substantially curtailed employee rights.

a. The Board's order violates the employees' right to be represented by a freely chosen majority representative.

It is undisputed that the Union no longer represented a majority of the employees when the Company refused to bargain. There can be no question that the written petition by 215 of 382 employees stating that they no longer wished to be represented by the Union was a reasonable basis for doubting the Union's continuing majority.* The Board itself has stated:

> "After the lapse of the certification year, the certification creates only a presumption of continued majority. This presumption is rebuttable. Proof of majority is peculiarly within the special competence of the Union . . . Accordingly, to overcome the presumption of majority the employer need only to produce sufficient evidence to cast serious doubt on the Union's majority status." *Stoner Rubber Co.*, 123 NLRB 1440 (1959)

See also, *Celanese Corporation of America*, 95 NLRB 664 (1951).

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* The Trial Examiner's gratuitous statement that "several employees had been induced to sign the petition by promises . . . or threats . . ." was based solely upon a hearsay statement in an affidavit, and is not suggested by any competent evidence. The entire Record is barren of any competent evidentiary support for the Examiner's comment which was improperly based only on a hearsay reporting of hearsay. *NLRB* v. *Amalgamated Meat Cutters, Local 127*, 202 F.2d 671 (9th Cir. 1953).

It is important to note that the affidavit of the Union official submitted in support of the unfair labor practice charge did not assert or in any way suggest that the Company had engaged in any unlawful conduct prior to the refusal to bargain on February 20, 1969. Rather, the affidavit recited in detail the substantial progress made in bargaining. The sole alleged unfair labor practice was the refusal to bargain on February 20.

The only conclusion to be drawn from the Union's affidavit was the one ultimately drawn by the Trial Examiner himself; to wit, "Respondent admittedly bargained in good faith from October 31 on . . ." (A16a).

In the light of these facts sworn to by the Union representative and later confirmed by the Trial Examiner, the informal petition signed by a majority of the employees was a clear mandate to the Company to cease its bargaining with the Union. The various Courts of Appeal have uniformly upheld a refusal by the Company to bargain under these circumstances. *Lodges 1746 and 743, IAM* v. *NLRB*, 416 F.2d 809 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970); *NLRB* v. *Alva Allen Industries, Inc.*, 369 F.2d 310 (8th Cir. 1966); *NLRB* v. *Laystrom Mfg. Co.*, 359 F.2d 799 (7th Cir. 1966); *NLRB* v. *Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964); *NLRB* v. *Mayer*, 196 F.2d 286 (5th Cir. 1952); *NLRB* v. *Inter-City Advertising Co.*, 154 F.2d 244 (4th Cir. 1946). Indeed it is an unfair labor practice to bargain with a minority union. See, also, *Glendale Mfg. Co.* v. *ILGWU, Local 520*, 283 F.2d 936 (4th Cir. 1960), *cert. denied*, 366 U.S. 950 (1961) and cases cited therein.

b. The order below violates the Section 10(b) statute of limitations and is in conflict with this Court's decision in *Machinists' Local* and the Sixth Circuit's decision in *Electric Furnace*.

The Union's affidavit in support of its unfair labor practice charge provides the best evidence of the parties' substantial progress in bargaining and the numerous proposals and counterproposals on which the parties negotiated and reached agreement.

Recognizing the insufficiency of the affidavit as the basis of a complaint, the Board tacked on the allegation of failure to supply wage rate and job classification information during the six months prior to the filing of the charge. This allegation, nowhere suggested by the Union's affidavit, was ultimately to serve as the "peg" for the orders below. The Trial Examiner's decision, the Board's decision and order, and the pro forma enforcement of that order by the Court below, were all premised upon (1) the Company's alleged failure to supply, from August 28, 1968 (the date six months prior to the filing of the charge) to October 23, 1968, job classification information that had been requested by the Union in May, 1968 (A13a);* and (2) the Company's alleged failure to supply wage information for one-third of the employees, which information had been orally requested on one occasion, October 31, 1968 (A14a-A15a).**

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* Clearly the establishment of job classifications was a goal that the Union expected to reach upon the consummation of a contract rather than something to be fulfilled during the course of negotiations. It was stipulated at the hearing that one of the Union's collective bargaining goals was that "Job classifications and wage rates, respectively, will be established and shall be maintained by the employer, and a list furnished to the Union within thirty (30) days from the signing of this contract." The Board, in its Brief to the Court of Appeals admitted as much: "The Union [upon being certified] compiled and presented a list of demands seeking among other things, . . . the establishment of job classifications." In any event, as set forth *infra* at page 13, the Union was provided with job descriptions for all employees as soon as the Union indicated that such information would be acceptable in lieu of classifications.

** The Trial Examiner also relied (A11a-A12a) upon *Poole Foundry & Mach. Co.* v. *NLRB*, 192 F.2d 740 (4th Cir. 1951), *cert. denied*, 342 U.S. 954 (1952). The Board quite properly abandoned its reliance on *Poole* in the court below. That case is premised solely upon the importance of settlement agreements to the administration and enforcement of the labor laws. There was no settlement agreement in the case at bar and *Poole* is inapplicable.

Insofar as the Board's decision is based upon the Company's alleged failure to supply job classifications, the decision completely contradicts this Court's holding in *Machinists' Local 1424* v. *NLRB*, 362 U.S. 411 (1960) which condemned the "finding of [a Labor Act] violation which is inescapably grounded on events predating the [six-month] limitations period." 362 U.S. at 422. As will be shown hereinbelow, the Board did at bar precisely what this Court in *Machinists' Local* held to be impermissible; namely, charge, prove, and find the existence of an unfair labor practice subsequent to August 28 "only through reliance on an earlier [time-barred] unfair labor practice" —in this case an alleged refusal in May to supply information. The Board thus improperly "reviv[ed] a legally defunct" matter.

In *Machinists' Local* the Court strictly construed Section 10(b) of the Act [29 U.S.C. § 160(b)] which provides "that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . ." The Court distinguished two situations regarding events pre-dating the six-month statutory cut-off date:

> ". . . [T]he purposes of § 10(b) [require] that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. *The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice.* There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And *where a complaint based*

> *upon that earlier event is time-barred, to permit the event itself to be used in effect results in reviving a legally defunct unfair labor practice.*" (Emphasis supplied). 362 U.S. at 416-17 (footnote omitted).

The case at bar fits squarely into the strictures of the second category outlined by this Court. In the instant case, the only time during the six-month period that the Union requested any information relating to job classifications or job descriptions was on October 31, 1968. At the very next negotiating meeting job descriptions were supplied. The last time prior to October 31 that classification information was requested was in early May,* close to four months prior to August 28, the statutory cut-off date. In response to that early request the Company promptly replied by letter that:

> "We have never classified the job nor assigned job titles to the various operating positions or stations in the Hy-Lan plant."

The Union did not respond to this letter. Rather, on October 31, for the first time, the Union stated that it would be satisfied with general "definitions" of the jobs performed.** As noted above, such job descriptions were promptly supplied at the next meeting.

It is thus clear that the finding of refusal to supply, subsequent to August 28, job classification information requested in May necessarily means that the Trial Examiner found that (a) the Company's May letter denying the existence of job classifications somehow constituted a wrongful refusal to supply such information; and (b) this refusal was somehow revived after August 28. The result is obvi-

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* The other information requested in May—wage rates and hiring dates—was immediately supplied.

** The Union had more than ample opportunity to suggest that job descriptions would be sufficient. Negotiating sessions were held on May 30, July 19, and September 10, the latter meeting taking place during the six-month period. Not once during this time did the Union make any request for the description of jobs.

ously at odds with *Machinists' Local,* for it amounts to a "reviv[al of] a legally defunct" matter and is a "finding of a violation which is inescapably grounded on events predating the [six month] limitations period."

In an attempt to avoid a holding which violated *Machinists' Local,* the Board theorized that the May request for job classifications was a continuing one, *i.e.,* that the request automatically renewed itself every day, and extended into the post-August 28 period. Therefore, held the Board, the fact that the Company did not supply job descriptions from August 28 until requested to do so in October constituted an unfair labor practice.

The "continuing violation" doctrine as a device to avoid the Section 10(b) statute of limitations was specifically disapproved by the Court in *Machinists' Local.* The Court was categorical:

> "The applicability of these [statute of limitations] principles cannot be avoided here by invoking the doctrine of continuing violation." 362 U.S. at 422.

Furthermore, under circumstances virtually identical to the case at bar, the Sixth Circuit Court of Appeals denied enforcement of an order of the Board based on the "continuing violation" doctrine. In that case, *NLRB* v. *Electric Furnace Co.,* 327 F.2d 373 (1964), the Sixth Circuit, following *Machinists' Local,* held that an employer would not be required to bargain with a union after the end of the certification year where there was "a substantial question concerning the Union's majority status" even though the employer, during bargaining, had failed to provide information necessary for bargaining. In *Electric Furnace,* the Board argued that the failure to supply information extended from November 5 (the six-month cut-off date) to January 24, even though the request for the information had been made on September 8, long prior to November

5. The Court of Appeals for the Sixth Circuit rejected this argument—the very argument adopted by the Fourth Circuit below—stating at 376:

> "The Board argues that the May 5, 1961, complaint, if not effective to reinstate the earlier charge, was at least valid as of May 5 and therefore reached back six months to November 5, 1960. The Board then contends that the refusal to furnish the pension information on September 8, 1960, was a continuing violation up to January 24, 1961, when the information was eventually furnished. It is argued that this continuing violation carried over into the six months prior to the complaint of May 5, 1961, and thus that complaint supports the finding of a refusal to bargain. We cannot accept this reasoning. The Company's refusal to furnish the requested information occurred on September 8. *To hold that this act continues indefinitely in the absence of further requests by the Union and under the circumstances here involved would do violence to § 10(b) and would render this provision of the Act virtually impotent.* Local Lodge No. 1424, International Association of Machinists v. N.L.R.B., 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832; N.L.R.B. v. Lundy Mfg. Corp., 286 F.2d 424 (C.A.2); American Federation of Grain Millers v. N.L.R.B., 197 F.2d 451 (C.A. 5)." (Emphasis supplied.)

The Sixth Circuit went on, in respect of the employer's refusal to bargain with the minority union, as follows:

> "If an employer has well-founded doubts about a Union's majority status, and no unfair labor practice on the part of the employer has caused this loss of majority, the employer may, at the end of the Union's certification year, refuse to bargain further with the Union. Brooks v. N.L.R.B., 348 U.S. 96, 75 S.Ct. 176, 99 L.Ed. 125; N.L.R.B. v. Superior Fireproof Door & Sash Co., 289 F.2d 713 (C.A. 2); N.L.R.B. v. Minute Maid Corp., 283 F.2d 705 (C.A. 5); Stoner Rubber Co., 123 N.L.R.B. 1440; Celanese Corp. of America, 95 N.L.R.B. 664." 327 F.2d at 376.

The Court of Appeals concluded at 377:

> "In this situation, the Company's refusal to bargain on February 9, 1961, was justified and therefore was not a violation of § 8(a)(5). Since the certification year has expired, and there is a substantial question concerning the Union's majority status, no useful purpose will be served by requiring the Company to continue to bargain unless and until the Union is certified again as bargaining representative following a new election. See Perry Coal Co. v. N.L.R.B., 291 F.2d 126, 128 (C.A.7); N.L.R.B. v. Superior Fireproof Door & Sash Co., supra."

It requires no extended comparative analysis to conclude that the decision below is in total conflict with the Sixth Circuit's decision in *Electric Furnace*. More important, however, is the fact that the holding below that the Company violated Section 8(a)(5) of the Act "from August 28, 1968 to at least October 23, 1968" (A13a) simply cannot be squared with the mandate of this Court in *Machinists' Local* that the six-month statute of limitations of Section 10(b) is inviolate and may not be indirectly eroded.

c. The Trial Examiner's explicit finding, adopted by the Board, that the Company bargained in good faith from October 31 to the date recognition was withdrawn precludes a determination that the Company refused to bargain during that period.

The Trial Examiner and Board made one other finding as to the Company's alleged refusal to bargain; to wit, that the Company failed to supply wage rates and dates of hire for one-third of the employees, which information was requested on October 31, 1968.*

Squarely inconsistent with the foregoing finding, however, was the further finding that "Respondent admittedly

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* The complaint contained no allegations relating to dates of hire, and there was no motion at the Hearing to amend the complaint.

bargained in good faith from October 31 on, and did not withdraw recognition until February 20, a period of 3½ months'' (A16a).

The obvious conflict in these two findings—refusal to bargain and bargaining in good faith—must, upon any rational view of the facts, be resolved in favor of the latter.

The good faith bargaining by the Company is established in any one of numerous ways:

(a) The Union's request for the wage rates and hiring dates was in response to the *Company's* inquiry on October 31, 1968 as to what information, if any, the Union desired. It should be noted that the Union had already received complete wage rate and hiring date information for all employees of the Company in May. Moreover, the Trial Examiner found that the facts ''indicated'' that the lack of ''fresh'' data did not impede bargaining (A15a).

(b) Substantial information was given to the Union on November 25, the first meeting after October 31. At no time after November 25 did the Union indicate that it had received incomplete information. Nor did the Union request any further information.

(c) The Union negotiator, Mr. Woodall, testified that after October 31, 1968 ''substantial progress was made,'' and that agreement had been reached ''on a good many of the proposals that the union had made.'' Woodall's affidavit in support of the unfair labor practice charge details the parties' agreement on such matters as union obligations, company rules, divisibility of agreement, maternity leave, non-discrimination, vacations, adjustment of grievances, no strike-no lockout, probationary period, job stewards, arbitration, transfers and promotions, and management rights.

(d) Bargaining was so substantial, in fact, that in January, 1969, the Union requested that the Board with-

draw the prior pending unfair labor practice complaint discussed at page 5, *supra*. The Union's request followed the Company's suggestion that withdrawal of the charge would enable the parties to bargain as friends. If the Union had any doubt as to the sufficiency of the wage and hiring date information supplied over a month before, on November 25, it certainly would not have requested the withdrawal of a charge which itself had been based on the Company's alleged failure to provide information.

(e) Counsel for the Board, satisfied that substantial progress in bargaining had been made, moved for withdrawal of the prior complaint. The Trial Examiner in the prior proceeding, finding that substantial progress had been made, approved the withdrawal of the complaint on January 14, 1969.

(f) Woodall's affidavit in the present proceeding did not state or even hint that the Union had received incomplete information. He did, however, list in the affidavit, in very great detail, the many proposals that were discussed at the various negotiating sessions and the numerous matters on which agreement had been reached. These admissions are significant when viewed in the light of Woodall's fourteen years' experience as a union official and his testimony that he was well aware of the purpose of the affidavit and had omitted only minor details therefrom.

Given these Record facts, and the Trial Examiner's finding, there simply was no evidence, considering the Record as a whole, from which the Board could reach any conclusion contrary to the finding of the Trial Examiner himself; namely that "Respondent admittedly bargained in good faith from October 31 on" (A16a). *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

d. This Court should review the far-reaching "extension of the certification year" doctrine which the Board erroneously utilized in this case to deprive employees of their right to bargain collectively through a majority representative.

In *Brooks* v. *NLRB,* 348 U.S. 96, 101-103 (1954), this Court held that under most circumstances an employer would be required to bargain with a union for a period of approximately one year after the union's certification (the so-called "certification year") irrespective of whether or not the union had, during the year, lost its majority status. The decision represented an accommodation of two aspects of the national labor policy, *i.e.,* the right of a majority of employees to designate their representative; and the necessity of providing a certified union a reasonable opportunity to carry out its mandate without having "to produce hothouse results or be turned out." 348 U.S. at 100.

Eight years after *Brooks,* the Board extended the holding of this Court by declaring that under certain circumstances, an employer would be required to bargain with a minority union for varying periods of time which might well extend to long after the expiration of the certification year. *Mar-Jac Poultry Co., Inc.,* 136 NLRB 785 (1962).

For a while, the Board limited its application of the "extension of the certification year" doctrine to those cases where an employer had refused to bargain during the certification year and, generally, where a substantial portion of the year had been spent litigating the Union's refusal to bargain unfair labor practice charge. Under these limited circumstances, the Board held that if the litigation terminated in either a settlement agreement or a finding that the employer had violated the Act, the employer would be required to bargain for a period generally not exceeding that portion of the initial certification year during which the employer had refused to bargain.

The purpose of the rule was to assure that a certified union would have a full year of uninterrupted bargaining. See, *e.g., NLRB* v. *C&C Plywood Corp.*, 413 F.2d 112 (9th Cir. 1969); *NLRB* v. *Gebhardt-Vogel Tanning Co.*, 389 F.2d 71 (7th Cir. 1968) (refusal to apply doctrine); *NLRB* v. *Burnett Constr. Co.*, 350 F.2d 57 (10th Cir. 1965); *NLRB* v. *Commerce Co.*, 328 F.2d 600 (5th Cir. 1964), *cert. denied*, 379 U.S. 817 (1964).

In the case at bar, however, the "extension of the certification year" doctrine was invoked in the face of the undisputed facts that (1) the parties met and bargained numerous times throughout the entire initial certification year; (2) the Company had never refused to negotiate; (3) substantial progress in bargaining had occurred and agreement had been reached on many proposals; (4) recognition was not withdrawn until 1½ months after the end of the certification year; (5) recognition was withdrawn only because of the employees' written petition stating that they no longer wished the Union to represent them; and (6) there was no Company conduct which was found by the Trial Examiner to have contributed to the Union's loss of majority status. Indeed, the only finding in this regard was that the alleged failure to update the wage information had not "impeded" bargaining (A15a).

On these undisputed facts it may fairly be said that the certification year was not extended, but rather was revived after the Union had lost its majority.

Coupled with the totally inappropriate application of the extension doctrine to this case is the fact that the employees' formal decertification petition was stayed, under Board policy,* pending the outcome of the unfair

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* The Board's policy is set forth in *General Electric Co. & Local 704* (Case No. 5-RD-205), 1961 CCH (NLRB) ¶ 10,601; and *International Powder Metallurgy Co., Inc.* (Case No. 6-RD-188), 1961 CCH (NLRB) ¶9,860. *Cf., Furr's Inc.* v. *NLRB*, 350 F.2d 84 (10th Cir. 1965).

labor practice charge. The petition was dismissed upon the Board's order extending the certification year.*

The result is that the employees' pleas to their employer and to the Board for decertification of the minority union are unanswered, whereas the employer has been directed to extend its bargaining beyond the 13½ months it had already bargained with the Union. The decree below thus forces the Company to bargain with a Union which was certified close to three and one-half years ago, and lost its majority over two and one-half years ago. Such a result is contrary to the clear weight of authority in the various Courts of Appeal. *NLRB* v. *Gebhardt-Vogel Tanning Company,* 389 F.2d 71 (7th Cir. 1968); *NLRB* v. *Southern Coach & Body Co.,* 336 F.2d 214 (5th Cir. 1964); *NLRB* v. *Electric Furnace Co., supra; NLRB* v. *Superior Fireproof Door & Sash Co., Inc.,* 289 F.2d 713 (2d Cir. 1961); *Mid-Continent Petroleum Corp.* v. *NLRB,* 204 F.2d 613 (6th Cir. 1953), *cert. denied,* 346 U.S. 856 (1953); *NLRB* v. *Bradley Washfountain Co.,* 192 F.2d 144 (7th Cir. 1951).

Application of the "extension of the certification year" doctrine to this case has made a serious and unwarranted inroad on the statutory right of employees to "self-organization" and "to bargain collectively through representatives of their own choosing." Act, Section 7. The balance struck by this Court in *Brooks* v. *NLRB, supra,* between the right of employees to designate and to revoke the designation of their representative and the importance of allowing a certified union a reasonable time to bargain has been completely destroyed. Here the Union had 13½

* Furthermore, the Court should note that it has been two and one-half years since the Company withdrew recognition from the Union. The delay in proceedings has been caused substantially by the Board. During this delay, there has been a substantial turnover of employees. Accordingly, the Board's order should not have been enforced. *Clark's Gamble Corp.* v. *NLRB,* 422 F.2d 845 (6th Cir. 1970), *cert. denied,* 400 U.S. 946 (1970).

months to bargain. Bargaining in fact occurred during the entirety of this period. In contrast, the majority petition to oust the Union was ignored and was summarily and erroneously dismissed.

Under these circumstances, review by this Court is warranted. The decree enforcing the bargaining order should be vacated, and the case should be remanded with instructions that the Company not be required to bargain further unless the Union is certified in a new election.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 25, 1971

APPENDICES

Appendix A

(Trial Examiner's Decision, Findings of Fact, Conclusions of Law, and Recommended Order)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners

Washington, D. C.

Case No. 11-CA-3838

HY-LAN FURNITURE, INC.

and

UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Yelverton Cowherd, Jr., Esq., of Winston-Salem, N. C., for the General Counsel.

William H. Smith, Jr., Esq., of Columbia, S. C., for Respondent.

Mr. D. H. Woodall, of Charlotte, N. C., for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

GEORGE TURITZ, Trial Examiner: Upon a charge filed on February 27, 1969, by Upholsterers' International Union

of North America, AFL-CIO ("the Union"), and served on February 27, 1969, upon Hy-Lan Furniture, Inc. ("Respondent," and, at times, "the Company"), the General Counsel of the National Labor Relations Board ("the Board"), through the Regional Director for Region 11, on April 23, 1969, issued and served a Complaint and notice of hearing against Respondent. Respondent filed its answer in which it denied all allegations of unfair labor practices and alleged, as further defenses, that certain allegations of the complaint were barred by Section 10(b) of the Act and that they had been finally disposed of and terminated by withdrawal of the Complaint and Charge in Case No. 11-CA-3579, which involved the same parties. A hearing was held at Hickory, North Carolina, on May 27, 1969, before the Trial Examiner named above. The General Counsel and Respondent were represented by their respective counsel at the hearing; the Charging Party was represented by its district director. At the close of the hearing the General Counsel argued orally; Respondent has filed a brief with the Trial Examiner.

Upon the entire record and from his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact

I. The Business of Respondent

Respondent, Hy-Lan Furniture, Inc., is a North Carolina corporation having a plant located in Hickory, North Carolina, where it is engaged in the manufacture, sale and distribution of furniture. It is a subsidiary of Unagusta Manufacturing Corporation. Respondent annually purchases and causes to be delivered to its Hickory plant directly from points located outside the State of North Carolina raw materials valued at in excess of $50,000; and Respondent annually sells and ships from its Hickory plant directly to customers located outside the State of

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North Carolina finished products valued at in excess of $50,000. It is found that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the National Labor Relations Act ("the Act").

II. The Labor Organization Involved

Upholsterers' International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The principal issues litigated at the hearing were whether Respondent had an adequate basis upon which to withdraw recognition from the Union, which had been certified approximately 13½ months before, and whether Respondent failed reasonably to comply with the Union's requests for information about the employees and their wages.

A. Sequence of Events

1. Background; Bargaining Before August 28, 1968[1]

On January 2, 1968, the Union was certified as representative of the following appropriate unit of Respondent's employees at the Hickory plant:

> All production and maintenance employees employed at the factory of Hy-Lan Furniture, Inc., at Hickory, North Carolina, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

[1] The Complaint alleges unfair labor practices on and after August 28, 1968, which was approximately 6 months before the filing and service of the Charge in the present case.

Shortly thereafter the Union presented a list of demands, including demands relating to general and merit wage increases, and wage adjustments and to job classifications and job evaluations. On January 3, 1969, the Union wrote to the Respondent noting its certification and requesting a bargaining conference. The letter requested the names of all employees in the appropriate unit, their hiring dates, job classifications, and hourly rates of pay, and information about any retirement and insurance programs, including information as to cost and contributions. The letter stated that the information was needed "In order for the Union representatives to enter into these negotiations and discuss issues intelligently." In a letter dated January 27 the Union noted that Respondent, in a letter dated January 12, had failed to mention the information previously requested which, the Union stated, was ". . . necessary, in order for the union representatives to enter into negotiations and discuss issues intelligently . . . ." The Union's letter repeated in full the items of information previously requested.

On February 23, 1968, the first negotiating meeting was held. Respondent's chief spokesmen were its attorney, one David Abrams, and Gene Minotto, its executive vice president. The Union again requested the same items of information, this time orally; and it stated that it could not negotiate wages intelligently without knowledge of Respondent's wage structure. Respondent replied that the matter was being worked on, but that it took time. On May 3, 1968, the Union received from Respondent a list of the unit employees with their respective rates of pay. No job classifications or descriptions were listed and the dates of hire were stated for only about half the employees. Respondent promised to send another updated list. On May 6 the Union again wrote to Respondent, calling attention to its prior request for information and stating that the names and hourly rates were "practically useless"

without the job classifications. On May 8 Respondent sent the promised "updated" list to the Union, this one complete as to rates of pay and hiring dates, but still omitting job classifications. On May 30 Respondent, in reply to the Union's May 6 letter, stated that it was "unable to furnish each employees' job classification or job title . . . We have never classified jobs nor assigned job titles to the various operating positions or stations in the Hy-Lan plant."

Further meetings with Abrams acting for Respondent were held on April 17, May 30 and July 19, and September 10, 1968.

2. Adjournment of Hearing in Case No. 11-CA-3579.

Meanwhile, on March 21, 1968, the Union filed a charge against Respondent in Case No. 11-CA-3579, and on July 16, 1968, a complaint was issued alleging, *inter alia*, a refusal to bargain in violation of Section 8(a)(5) of the Act based in part on allegedly bad faith in negotiating and on a refusal by Respondent to furnish necessary information. On October 23 the hearing in that case opened before Trial Examiner Sidney J. Barban. Respondent was represented by new counsel, Ellison Smith and William Smith. Before the hearing was opened Respondent proposed to enter into an informal settlement agreement under which it would correct an allegedly invalid no-solicitation rule, post a notice, and resume bargaining. The General Counsel and the Union were agreeable to those terms of settlement except that the Union insisted that it be formal and provide for a court decree, but this was not acceptable to Respondent. Trial Examiner Barban thereupon suggested that the hearing be adjourned for a time during which the parties could engage in further negotiations. He stated:

> Now, it is my understanding that the Respondent is willing to do this, and has agreed that it would

> hold an initial bargaining session before November 4 of this year, and would thereafter engage in expeditious bargaining at reasonable times and places . . . .

Counsel for Respondent stated:

> As far as the Company is concerned, we are in agreement with the Trial Examiner and as I indicated in an off-the-record discussion, we will be prepared to meet and will go forward in negotiations within the framework of our obligation and we will do that which is required of us in connection with collective bargaining, and we think that your proposal is practical and sound, and we will do everything within our power to abide by it, and within the frame of the intention which you have in mind.

The Union representative stated:

> . . . Now, we think that we should go ahead with this; however, we agree with what you have stated in the record. We will bargain and bargain in good faith and do our best to accomplish what you have apparently intended for us to do in your recommendation.

Trial Examiner Barban further stated: "The only thing I intend, gentlemen, is that the purposes of the law be met, and I make no inferences that it hasn't been, or that it won't be, or anything of that sort, but only to give you an opportunity which may carry out the purposes of the Act."

The hearing was adjourned to December 17; later it was further postponed to January 20, 1969.

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3. Bargaining Subsequent to August 28, 1968

The September 10 session was the last attended by Abram. As of that time Respondent had not furnished the job classifications requested, nor any insurance information.

Following the adjournment of the hearing in Case No. 11-CA-3579, further bargaining sessions were held on October 31, November 25, and December 13, 1968, and January 6, 1969.[2] Respondent's chief spokesman was its attorney, William Smith. Also participating for Respondent were Jack Sherrill, a vice president, Helen B. Short, an assistant vice president, and Bill White, production manager. Woodall and an employee committee represented the Union. Woodall testified without contradiction: "Substantial progress was made. Mr. Smith began giving us counter-proposals, and we began to bargain, after Mr. Smith came in on the scene on October 31, 1968." He stated that agreement was reached "on a good many of the proposals that the union had made, or some counter-proposal of a like nature."

At the meeting on October 31, during discussion of the question of how many shop stewards were to be provided for, the negotiators went out into the plant to ascertain approximately how many employees were in each department. When they returned, Woodall remarked that all that trouble would have been avoided if Respondent had furnished the information the Union had been requesting. Smith asked what information was desired. Woodall told him he needed insurance facts, and the employees' wages, job classifications and hiring dates. Sherrill stated, ". . . we really don't have classifications, we have more of the

[2] Meetings were scheduled for several other dates but were postponed because of weather or illness, one at the request of the Union, and four at the request of Respondent.

job description, rather than classifications." However Smith promised to get the requested information to the Union with respect to both insurance and wages "right away." The parties met again on November 25. The Union acknowledged receipt of a complete copy of the insurance plan but not the cost information. Information as to insurance costs was immediately furnished orally to the Union's satisfaction.

Respondent handed the Union a list of all 382 employees in the unit as of that time. Unlike the May list, it showed the employees' respective departments and classifications, but dates of hire and rates of pay, which were shown on the May list, were omitted. One hundred and twenty seven of the names did not appear on the May 8 list. The evidence as to the Union's reaction upon receipt of the list is discussed below.

4. Withdrawal of the Complaint and Charge in Case No. 11-CA-3579

At the January 6 meeting, when the parties began to discuss a date for their next meeting, Smith pointed out that the hearing in Case No. 11-CA-3579 was scheduled to resume on January 20. Woodall replied, "Yes, I know that, but we are right down to the top issues, such as the wages, checkoff, and the cost items, really." Smith suggested that the Union's charge be withdrawn, saying that to come to the table as friends would be helpful in working out these "top issues."

After consulting the Union's legal department Woodall, on January 8, 1969, sent the following telegram to the Regional Director:

> RE: CASE NO. 11-CA-3579 HY-LAN FURNITURE, INC. . . . CHARGING PARTY RESPECTFULLY REQUESTS WITHDRAW OF CHARGES IN THE ABOVE CASE. PLEASE TAKE APPROPRIATE AND NECESSARY ACTION ACCORDINGLY.

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On January 10 counsel for the General Counsel served and filed the following motion to Trial Examiner Barban, attaching the Union's telegraphed withdrawal request as "Exhibit 1":

MOTION

> After being informed by the parties that substantial progress has been made towards reaching a contract since the opening of the hearing in above matter; and upon receipt of Exhibit 1, attached hereto, Counsel for the General Counsel respectfully moves to withdraw the Complaint issued herein and recommends that an Order issue approving said motion.

On January 11 Respondent notified Trial Examiner Barban by telegram that it had no objection to the General Counsel's Motion to Withdraw the Complaint. On January 14 Trial Examiner Barban issued the following order in Case No. 11-CA-3579:

ORDER APPROVING WITHDRAWAL OF COMPLAINT

> The hearing in the above matter opened on October 23, 1968 and adjourned on said date to allow the parties time to continue negotiations. It appearing that the parties have made substantial progress toward reaching an agreement; and the charging party having filed its request to withdraw the charges herein; and Counsel for the General Counsel having filed a motion to withdraw the Complaint; and having duly considered the matter, and good cause shown therefor, it is,
>
> HEREBY ORDERED, pursuant to Section 102.25 of the Board's Rules and Regulations, Series 8, as

amended, that the foregoing Motion be, and hereby is, granted.[3]

5. The Withdrawal of Recognition

On February 13, 1969, 215 of the 382 employees then in the appropriate unit signed an informal petition which was used to support a petition to decertify the Union.[4]

The parties met on February 20. When the Union took up the negotiations where they had left off on January 6, Smith stated that Respondent had information that a majority of the employees no longer wished to be represented by the Union. Asked whether he had checked the authenticity of his information, Smith said that he had not done so himself but that he was sure it was right. Employee-members of the negotiating committee said that several employees had been induced to sign the petition by promises of wage increases or threats of discharge, to which Smith replied that if any such threats had been made they had been unauthorized. He said, "We cannot bargain with you. I suggest you file a new petition." Woodall replied that the Union was still the certified bargaining agent and expected Respondent to continue to bargain until it was decertified. Respondent left the meeting and on February 27 Woodall filed the present charge.

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[3] It is not clear whether Trial Examiner Barban's Order ruled upon the Charging Party's request to withdraw the Charge, as well as General Counsel's Motion to Withdraw the Complaint. However, in the present case the General Counsel treated the Order as an approval of the withdrawal request, and it is so considered for purposes of the present Decision. See *National Labor Relations Board Rules and Regulations and Statements of Procedures, Series 8, as amended*, Section 102.9.

[4] The formal petition and the informal supporting petition were filed on February 24, 1969, in Case No. 11-RD-150, which is still pending.

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B. Concluding Findings

1. Withdrawal of Recognition

A striking feature of this case is that the Union withdrew the old Charge in response to Respondent's urging that this would enable the parties to bargain at their next meeting "as friends," but when they next met, Respondent, on the basis of supervening circumstances, withdrew recognition and refused to bargain.

On October 23, 1968, Respondent undertook to engage in negotiations with the Union and "do that which is required of us in connection with collective bargaining . . . " That undertaking of Respondent's was made in lieu of an informal settlement agreement which Respondent was willing to enter into requiring it to bargain with the Union. Implicit in the undertaking was the understanding that such bargaining would be continued for a reasonable time. Effective bargaining is necessarily impeded if a union is required to bargain under a constant threat of loss of its representative status. The Board stated in *Poole Foundry and Machine Company*, 95 NLRB 34, 36, enfd. 192 F. 2d 740 (C.A. 4), cert. denied 342 U.S. 954:

> It is well settled that after the Board finds that an employer has failed in his statutory duty to bargain with a union, and orders the employer to bargain, such an order must be carried out for a reasonable time thereafter without regard to whether or not there are fluctuations in the majority status of the Union during that period . . . Similarly, a settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a reasonable time in which to conclude a contract . . .

See, also, *I.M. Jaffe and Sons, d/b/a Lahey's of Muskegon*, 176 NLRB No. 66. The same policy has been applied

with respect to recognition agreements. See *N.L.R.B.* v. *Universal Gear Service Corporation*, 394 F. 2d 396 (C.A. 6), enfg. 157 NLRB 1169, where the Court quoted with approval the Board's statement that "only if the parties can rely on the continuing representative status of the lawfully recognized union, at least for a reasonable period of time, can bargaining negotiations succeed and the policies of the Act be effectuated." See also *Keller Plastics Eastern, Inc.*, 157 NLRB 583, where the Board stated at page 587:

> With respect to the present dispute which involves a bargaining status established as the result of voluntary recognition of a majority representative, we conclude that, like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining. Such negotiations can succeed, however, and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time.

Whether Respondent's solemn undertaking before Trial Examiner Barban, followed by the Union's withdrawal of the Charge at Respondent's suggestion that it would be in aid of bargaining, be deemed tantamount to a settlement agreement, cf. *Gebhard-Vogel Tanning Company*, 154 NLRB 913, 915, or tantamount to a recognition agreement, Respondent was required to bargain with the Union for a reasonable time.

As stated by the Board in *N. J. MacDonald & Sons, Inc.*, 155 NLRB 67, at page 71: "The determination of what constitutes 'a reasonable time' depends upon the particular circumstances involved. What is reasonable in one case may not be so in another . . . But, where the parties had

not reached an impasse in negotiations, 6 months was held not to be 'a reasonable time.'" After the October 23 hearing the parties met and negotiated on October 31, November 25, December 13 and January 6, and they made considerable progress towards reaching agreement. It is found that the bargaining was not carried on for a reasonable period and that Respondent's withdrawal of recognition on February 20 was therefore violative of Section 8(a)(5) of the Act.

2. The Refusal to Furnish Information

(a) From August 28, 1968, until at least October 23, 1968, Respondent continued to refuse to furnish information as to the employees' classifications which the Union had repeatedly requested. Respondent's position in this respect had been set forth in its letter dated May 30, 1968, and at no time prior to October 23[5] was that position modified. The letter claimed that Respondent could not furnish the classifications for the following reason: "We have never classified jobs or assigned job titles." Short, Respondent's assistant vice president, testified that one or more times each year, in connection with wage surveys, Respondent did classify the employees by job and that when Smith caused Respondent finally to comply with the Union's request, the employee assigned to prepare the list knew from her prior experience just how to go about it and required no instructions. It is found that from August 28, 1968, to at least October 23, 1968, Respondent in bad faith and for the purpose of impeding bargaining refused to furnish to the Union necessary information as to the job classifications of the employees in the unit, and that Respondent thereby violated Section 8(a)(5) of the Act. The

[5] On October 23 Respondent promised to bargain in good faith. It did not specifically agree to furnish the information until October 31, and the information was not actually furnished until November 25.

withdrawal of the Charge and Complaint in Case No. 11-CA-3579, which included allegations of failure to furnish information, was not based on lack of merit and in no sense represented an adjudication or a disposition of the merits of those allegations. As the Regional Director could have reinstated that Charge, see *N.L.R.B.* v. *Lasko Metal Products, Inc.*, 363 F.2d 529, enforcing 148 NLRB 976, he could entertain the new charge notwithstanding the fact that it covered matter included in the withdrawn case.[6]

(b) Woodall testified that when the employee list was handed to him on November 25, he protested Respondent's failure to give the then current wage rates and hiring dates, that Sherrill said that this information already had been furnished in the May list, that Woodall replied that the wage information previously furnished was stale, and that two employees on the bargaining committee said that they themselves had received wage increases since May. Short testified that she recalled no such discussion or any indication by Woodall that he was "very unhappy" with the information furnished on November 25. Respondent did not produce Sherrill and General Counsel did not produce either of the two employee members of the committee referred to by Woodall.

It is unnecessary for purposes of this case to resolve the question of credibility as between Short and Woodall. It is undisputed that Respondent failed at all times to furnish to the Union the hiring dates or rates of pay of 127 of the 382 employees in the unit on November 25, information embraced in the Union's October 31 request. It is true that Woodall made no further demand for the information at the bargaining sessions on December 13 and January 6; nor

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[6] Such reinstatement or new charge could not operate to permit the finding of unfair labor practices based on activities occurring more than 6 months prior to such reinstatement or new charge. See *Koppers Company, Inc., Forest Products Division*, 163 NLRB No. 64.

did the Union repeat its request in writing, as it had done before Smith had come into the picture. While these facts may indicate that Woodall did not feel at the time that the lack of fresh wage data impeded the Union at that stage of the bargaining, they do not warrant the inference that he intended to waive the Union's right to the information when the subject of wages would be attacked. Such a waiver, to be found, must be expressed in clear and unequivocal language. See *California Portland Cement Company,* 101 NLRB 1436, 1439. As Respondent's withdrawal of recognition made its failure to furnish the wage rates and dates of hire of the 127 employees final, it is found that such failure was violative of Section 8(a)(5) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

It is found that the activities of Respondent set forth above in section III, occurring in connection with its operations described in section I, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

As it has been found that Respondent has engaged in certain unfair labor practices, it recommended that the Board issue the recommended order set forth below requiring Respondent to cease and desist from said unfair labor practices and to take certain affirmative action which will effectuate the policies of the Act.

Counsel for the General Counsel has requested that the remedy ordered in this case provide that the certification year be extended to a period of 1 year from such date as Respondent furnishes a list of employees in the unit with

their dates of hire, wage rates and classifications. See *Amax Aluminum Extrusion Products, Inc.*, 174 NLRB No. 63; *Huttig Sash and Door Company, et al.*, 173 NLRB No. 118. Basically, the only remedial action which the Board may take is to remedy unfair labor practices which took place during the period of limitation prescribed by Section 10(b) of the Act. While the Board may look to earlier events to determine the appropriate remedy to be prescribed for such unfair labor practices, see *N.L.R.B.* v. *Lundy Manufacturing Corporation*, 316 F. 2d 921, enforcing 136 NLRB 1230, cert. denied 375 U.S. 895, the Board has specifically held that a certification year cannot be extended on the basis of a failure to bargain occurring before the 10(b) period. *Dean Sellers, Inc.*, 174 NLRB No. 56. In the present case almost 8 months elapsed from the date of certification to the date of limitation fixed by Section 10(b). In addition, Respondent admittedly bargained in good faith from October 31 on, and did not withdraw recognition until February 20, a period of 3½ months. While Respondent during that period was in default with respect to the furnishing of information, such default did not prevent the parties from making considerable progress in their negotiations. It is unnecessary to decide in this case to what extent it would be appropriate to extend a certification year because of failure to furnish information where bargaining was otherwise in good faith and progressed substantially notwithstanding the absence of the information. The bargaining order recommended below requires Respondent to bargain for a reasonable period of time without regard to whether or not there are fluctuations in the majority status of the Union. See *International Association of Machinists* v. *N.L.R.B.*, 311 U.S. 72, 82-83; *N.L.R.B.* v. *Tower Hosiery Mills*, 180 F. 2d 701, 706 (C.A. 4), cert. denied 340 U.S. 811.

Upon the basis of the foregoing findings of fact and of the entire record in this case the Trial Examiner makes the following:

Appendix A

Conclusions of Law

1. Respondent, Hy-Lan Furniture, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is, and at all times material has been, an employer within the meaning of Section 2(2) of the Act.

3. Upholsterers' International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. All production and maintenance employees employed at Respondent's factory at Hickory, North Carolina, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material the Union has been, and it still is, the exclusive representative of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment, within the meaning of Section 9(a) of the Act.

6. By refusing to bargain collectively in good faith with the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Appendix A

Recommended Order

On the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, Respondent, Hy-Lan Furniture, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to meet and confer with Upholsterers' International Union of North America, AFL-CIO, with respect to wages, hours, and other terms and conditions of employment of Respondent's employees in the appropriate unit, and with respect to the negotiation of an agreement and of any question arising thereunder. The appropriate unit is:

All production and maintenance employees employed at Respondent's factory at Hickory, North Carolina, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) Failing to furnish information requested by the Union with respect to the job classifications, dates of hire, and rates of pay of each employee in the appropriate unit.

(c) In any other manner refusing to bargain with the Union as required by Section 8(a)(5) and (d) of the Act.

(d) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which, it is found, will effectuate the policies of the Act:

(a) Upon request, meet with, and bargain collectively with, the Union as the collective-bargaining

representative of the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Furnish the Union, on request, within a reasonable time, information with respect to job classifications, rates of pay and dates of hire of all employees in the appropriate unit.

(c) Post at its office and place of business located in Hickory, North Carolina, copies of the notice attached hereto marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by its representative, shall be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by any other material.

(d) Notify said Regional Director for Region 11, in writing, within 20 days from the receipt of this Recommended Order, what steps Respondent has taken to comply herewith.[8]

Dated at Washington, D.C.—Jun 30 1969

/s/ GEORGE TURITZ
Trial Examiner

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[7] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[8] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

Appendix B

(Decision and Order of National Labor Relations Board)

180 NLRB No. 57

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 11-CA-3838

HY-LAN FURNITURE, INC.,

and

UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO.

DECISION AND ORDER

On June 30, 1969, Trial Examiner George Turitz issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision, with supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error

was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner consistent with the modifications set forth below.

The Trial Examiner found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to continue to meet and bargain with the Union and by failing and refusing in accordance with the Union's several requests to furnish information necessary and relevant to the bargaining process. The Trial Examiner recommended that the Respondent be ordered to resume bargaining with the Union for a reasonable period of time without regard to fluctuations in the majority status of the Union. For the reasons related below the Board agrees.

The record reveals that the Union was certified on January 2, 1968, and on the following day served on the Respondent a written request for the names of the employees in the bargaining unit, their dates of hire, rates of hourly pay, and job classifications, and data concerning any existing insurance or retirement programs, including information as to costs and contributions. The Respondent failed to reply to this request, and it similarly ignored subsequent requests made by the Union on January 27 and February 23, 1968. On March 21 the Union filed its charge in Case 11-CA-3579, and on July 16, 1968, the General Counsel issued a Complaint alleging that the Respondent had refused to bargain.

In the interim, on May 3, 1968, the Respondent furnished the Union with a list of the names of the employees in the

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[1] We hereby correct the Trial Examiner's inadvertent error that the Union wrote to the Respondent noting its certification and requesting bargaining on January 3, 1969, rather than on *January 3, 1968.*

unit, but the list contained no job classifications and recited hiring dates for only about half the employees. The Union protested that the list was "practically useless" without job classifications, and although the Respondent furnished the Union with an updated list on May 8, 1968, this latter list also failed to recite the employees' job classifications or titles. After a further period of time the Respondent advised the Union, incorrectly as it turned out, that it did not classify jobs or assign job titles.

At the opening of the hearing in Case 11-CA-3579 on October 23, 1968, the Respondent indicated its willingness to enter into an informal settlement agreement, post a notice, and resume bargaining. The Union objected to settlement upon an informal basis, but upon the Respondent's assertion of willingness to bargain in good faith, including compliance with its obligation to furnish the Union with data relevant and necessary to the bargaining process, the Trial Examiner in that case granted an adjournment of the hearing to December 17, 1968; this adjournment was later extended to January 20, 1969.

The parties resumed bargaining on October 31, 1968, but the Respondent made no pretense of complying with the Union's request for employee job classifications or insurance data until November 25. At a bargaining session on the latter date the Respondent orally advised the Union of pertinent insurance data and also gave the Union a written list of names of 382 employees in the bargaining unit, together with their classifications and assigned departments. However, the list furnished to the Union on this occasion contained neither dates of hire nor wage rates, and inasmuch as the list contained the names of 127 employees who were not included in the list furnished the Union on May 8, 1968, the Union was still without pertinent data for nearly a third of the employees in the bargaining unit. The Respondent made no further attempts to supply the Union with wage rates or hiring dates for the 127 employees. On January 6, 1969, at a bargaining session, Respondent asked

the Union to withdraw the charges in Case 11-CA-3579, contending that the withdrawal would promote a spirit of cooperation favorable to reaching agreement. The Union did so, and on January 14, 1969, the complaint was withdrawn. Thereafter, on February 20, 1969, the Respondent discontinued bargaining on the assertion that a majority of its employees had signed a petition to the effect they no longer wished to be represented by the Union.

The Board may not find substantive violations of the Act based on events which occurred more than 6 months prior to the filing and service of the charge. We may, however, consider events outside the limitations period to shed light on the true character of matters occurring within the limitations period, and we may also consider such events for the purpose of enabling us to frame remedial measures necessary to expunge the effect of unfair labor practices found to have occurred within the limitations period. *Lundy Manufacturing Corporation*, 136 NLRB 1230, enfd. 316 F.2d 921 (C.A. 2), cert. denied 375 U.S. 895. In the instant case, in spite of numerous requests by the Union, the Respondent failed and refused to supply data necessary for meaningful and intelligent bargaining. As the Trial Examiner found, the parties did meet and bargain on four occasions following October 23, 1968, and they made some progress toward a bargaining agreement. However, issues with respect to wages and other economic benefits were not settled prior to the date the Respondent broke off negotiations, and the Union was in no position to engage in meaningful negotiations on these issues without the benefit of the data it had requested. The information in question was fundamental to the bargaining process and Respondent's refusal to supply it derogated not only from the Union's status, but also its ability to function as the bargaining agent. In these circumstances, having refused in an important respect to bargain in good faith, Respondent

cannot be heard to question the Union's continued majority status.[2]

True it is that the Respondent's initial refusals occurred outside the period of limitations, but they nevertheless continued within the 6-month period preceding the filing of the instant charge, and also within the period when Respondent was precluded from questioning the Union's majority status because the Union was in its initial year of certification. We also note that the continuing refusals occurred after the Respondent had induced the Union to withdraw the prior charge by agreeing to comply with its statutory duty to bargain. In order to place the parties in the position they would have been but for the Respondent's unfair labor practices, we shall adopt the Recommended Order of the Trial Examiner that, upon request, Respondent resume bargaining with the Union.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Hy-Lan Furniture, Inc., Hickory, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., Dec. 16, 1969.

FRANK W. McCULLOCH, Chairman

HOWARD JENKINS, JR., Member

SAM ZAGORIA, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[2] *C & C Plywood Corporation and Veneers, Inc.*, 163 NLRB 1022.

Appendix C

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 15,008

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

HY-LAN FURNITURE, INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Argued March 4, 1971. Decided March 10, 1971.)

Before BOREMAN, BRYAN and CRAVEN, *Circuit Judges.*

Joseph E. Mayer, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and John D. Burgoyne and William J. Avrutis, Attorneys, National Labor Relations Board, on brief) for Petitioner, and Arthur C. Silverman (Golenbock and Barell on brief) for Respondent.

PER CURIAM:

Upon consideration of the briefs, the appendix filed by the National Labor Relations Board, and arguments of counsel, we conclude that the Board's order should be enforced.

Enforcement granted.

Appendix D

(Order of Court of Appeals Denying Petition for Rehearing)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 15,008

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HY-LAN FURNITURE, INC.,

Respondent.

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition of Hy-Lan Furniture, Inc., respondent herein for a rehearing en banc in this case, no judge in regular or active service or a member of the panel that rendered the decision sought to be reheard having requested a vote on the suggestion in the petition for rehearing, it is

ORDERED, that the said petition be, and it is hereby, denied.

For the Court:

/s/ ALBERT V. BRYAN
United States Circuit Judge

FILED
Apr 1 1971
SAMUEL W. PHILLIPS
Clerk

Appendix E

(Enforcement Decree of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 15,008

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HY-LAN FURNITURE, INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for enforcement of an order issued by it against Respondent, Hy-Lan Furniture, Inc., on December 16, 1969, in proceedings before the said Board known upon its records as Case No. 11-CA-3838; upon the answer of said Respondent, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said order of the National Labor Relations Board be, and it is hereby, enforced; and that the Respondent, Hy-Lan Furniture, Inc., abide by and perform the directions of the Board in said order contained.

s/ SAMUEL W. PHILLIPS
Clerk

FILED
Apr 8 1971
SAMUEL W. PHILLIPS
Clerk

Appendix F

(Statutes)

National Labor Relations Act, As Amended

§ 7 [29 U.S.C. § 157]. Rights of employees.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

§ 8(a) [29 U.S.C. § 158(a)]. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

§ 10 [29 U.S.C. § 160]. Prevention of unfair labor practices.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the

Appendix F

Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, . . . : *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-337

HY-LAN FURNITURE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25a) is reported at 437 F. 2d 1356. The Board's decision and order (Pet. App. 1a–24a) are reported at 180 NLRB No. 57.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a) was entered on April 8, 1971, and the petition for a writ of certiorari was filed on June 25, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

439-956—71——1

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly ordered the employer to continue to recognize and bargain with the union notwithstanding its loss of employee support.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 28a–29a.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On January 2, 1968, the Board certified the Upholsterers' International Union of North America, AFL–CIO ("the Union"), as the representative of the production and maintenance employees at the Company's Hickory, North Carolina furniture plant (Pet. App. 3a). On January 3, the Union notified the Company of its certification and requested a bargaining conference. It also asked the Company to furnish the names of all employees in the bargaining unit, their hiring dates, job classifications, and hourly rates of pay, and information about any retirement and insurance programs, their cost to the Company, and the contributions made by the employees (Pet. App. 4a; A106).[1] On January 27, the Union repeated its request (Pet. App. 4a; A107–108). At the parties' first negotiating meeting on February 23, Union Representative Woodall reminded Company Attorney Abrams and Executive Vice-President Minotto that

[1] "A" references are to the appendix in the court below.

he had not received the information requested. Minotto responded, "We are working on this, it takes time." (Pet. App. 4a; A48–49.)

On March 21, the Union filed an unfair labor practice charge with the Board alleging, *inter alia,* that the Company was bargaining in bad faith and refusing to furnish necessary information (Pet. App. 1a–2a). On May 3 the Union received a list of the unit employees with their respective rates of pay. The Company, however, did not list the employees' job classifications, or the dates of hire for about half of them. It promised to send an updated list. (Pet. App. 4a–5a; A109–113, 144–159.) The Union wrote the Company on May 6, calling attention to the prior request for information and adding that the names and hourly rates were "practically useless" without the job classifications (Pet. App. 4a–5a; A114–115). On May 8, the Company sent another list, which was complete as to rates of pay and hiring dates, but still omitted job classifications or titles (Pet. App. 5a; A116–120).

The Company notified the Union on May 30 that it was unable to furnish job classifications or job titles, because it had "never classified the job nor assigned job titles to the various operating positions or stations in the Hy-Lan plant" (Pet. App. 5a; A121). The Union met further with Company Attorney Abrams on April 17, May 30, July 19, and September 10, 1968. At these meetings, it continued to ask without avail for information relating to the Company's insurance and pension programs. (Pet. App. 5a, 13a; A50–51.)

On October 23, at the outset of the hearing on the Union's unfair labor practice charge, the Company

proposed an informal settlement agreement under which it would correct an allegedly invalid no-solicitation rule, post a notice, and resume bargaining (Pet. App. 5a–6a; A51). The Union proposed a formal agreement that would include a court decree, but this was not acceptable to the Company (Pet. App. 5a; A51, 138–139). Pursuant to the Trial Examiner's suggestion, the hearing was adjourned so that the parties might negotiate further (Pet. App. 6a; A143).

Additional bargaining sessions were held on October 31, November 25, and December 13, 1968, and January 6, 1969 (Pet. App. 7a–8a, 22a; A52, 54, 71, 73). At the October 31 meeting, the Company's new chief negotiator and attorney, William Smith, agreed to provide the Union with information as to insurance and job classifications (Pet. App. 7a–8a; A52–53). The Union received a copy of the Company's insurance plan before the next (November 25) meeting, but no data as to its cost; this information was furnished orally at this meeting (Pet. App. 7a–8a; A58, 71, 91–92, 95–97). The Company also gave the Union a list of the 382 employees then in the unit, showing each employee's respective "department" and his "job classification," but not the dates of hire and rates of pay.[2] (Pet. App. 8a; A122–135.)

At the January 6 meeting, Smith pointed out that the unfair labor practice hearing was scheduled to resume on January 20. Union Negotiator Woodall

[2] One hundred and twenty-seven of the names on the November 25 list were not on the earlier May list (Pet. App. 8a; A122–135, 144–159), and hence the Union had neither the date of hire nor rate of pay for these employees.

stated that the matters to be discussed had been reduced to "the top issues," namely wages, checkoff, and the cost items (Pet. App. 8a–9a, 22a–23a; A59–60). Smith replied that, if the parties came to the table "as friends," it "would be helpful in working these top issues out"; he "suggested" that the Union "withdraw" its charge. The Union did so, and that proceeding was terminated. (Pet. App. 8a; A60.)

On February 13, 1969, after the Union had withdrawn its charge but before another meeting had occurred, 215 of the 382 employees then in the appropriate unit signed a petition indicating that they no longer wished to be represented by the Union (Pet. App. 10a). When the parties next met on February 20, Smith told Union negotiators that the Company had "reliable" information that a majority of the employees "no longer wish to be represented by your Union" (Pet. App. 10a; A60–61). Employee members of the negotiating committee replied that several employees had been induced to sign the petition by promises of wage increases or threats of reprisals. Smith declared that any such promises or threats, if made, were "strictly without any authority." (Pet. App. 10a; A75–77.) He refused to bargain further and suggested that the Union "file a new petition" (Pet. App. 10a; A61). Union Representative Woodall replied that the Union was still the certified agent and that it expected the Company to continue to bargain with it until it was decertified (*ibid.*). The Company left the meeting, and, on February 27, the Union filed the unfair labor practice charge on which the present proceeding is based. (Pet. App. 10a; A77.)

B. THE DECISIONS BELOW

Upholding its Trial Examiner, the Board found that the Company refused to furnish the Union with information "fundamental to the bargaining process": that these refusals "continued within the 6-month period preceding the filing of the instant charge, and also within the period when [the Company] was precluded from questioning the Union's majority status because the Union was in its initial year of certification"; and that, as a result, "the Union was in no position to engage in meaningful negotiations" on the wage and other issues which "were not settled prior to the date [February 20, 1969] the [Company] broke off negotiations." The Board concluded that by refusing to continue bargaining with the Union and by failing and refusing to furnish the Union essential information requested by it, the Company violated Sections 8(a) (5) and (1) of the Act. The Board held that in this circumstance, the Company "cannot be heard to question the Union's continued majority status." (Pet. App. 23a–24a.) The Board ordered the Company, *inter alia*, "to resume bargaining with the Union for a reasonable period of time without regard to fluctuations in the majority status of the Union" (Pet. App. 21a). The court of appeals enforced the Board's order *per curiam* (Pet. App. 25a).

ARGUMENT

1. Petitioner's contention that it was justified in withdrawing recognition from the Union on February 20, 1969, when it learned that a majority of the employees no longer desired the Union, rests on the

premise that the employee decision was not attributable to any unfair labor practice committed by the Company. The Board found, however, that the Company violated its bargaining obligation by refusing repeatedly the Union's requests for information which was necessary to enable it to engage in meaningful contract negotiations.[3] The resulting delay in successful bargaining was likely to induce employees to withdraw from the Union, since it appeared that their representative was not accomplishing anything. In the circumstances, the Board was justified in requiring the Company to recognize and bargain with the Union for an additional reasonable period of time, notwithstanding the loss of employee support. See *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 612–613. This factual issue does not warrant further review.

2. Contrary to petitioner's assertion (Pet. 12), the Board's decision here is not inconsistent with the six-

[3] Petitioner's contention concerning inconsistent findings (Pet. 16–18) is wide of the mark. The Board did not adopt the Trial Examiner's finding that the Company bargained in good faith from October 31, 1968, to the date recognition was withdrawn. It limited its holding as follows (Pet. App. 23a): "As the Trial Examiner found, the parties did meet and bargain on four occasions following October 23, 1968, and they made some progress toward a bargaining agreement. However, issues with respect to wages and economic benefits were not settled prior to the date the Respondent broke off negotiations, and the Union was in no position to engage in meaningful negotiations on these issues without the benefit of the data it had requested." This in no way conflicts with its ultimate finding, that petitioner violated its bargaining obligation.

month limitation bar of Section 10(b),[4] as construed in *Local Lodge No. 1424* v. *National Labor Relations Board* (*Bryan Mfg. Co.*), 362 U.S. 411. There, the only activity within the limitations period was the enforcement of a union security agreement, valid on its face. Since that activity, by itself, was lawful, and was impeached only by evidence of an event occurring long before the limitations period (showing that the union lacked majority status when it entered into the agreement), the Court held that the complaint was barred by Section 10(b). Here, on the other hand, the Company engaged in illegal conduct within the 10(b) period, by rejecting the Union's renewed requests for information within that period. As stated above, the Board's finding to this effect is amply supported.

Similarly, *National Labor Relations Board* v. *Electric Furnace Co.*, 327 F. 2d 373 (C.A. 6) (Pet. 14–16), does not aid petitioner. There, the court held that a rejection of the union's request for information was not a continuing violation "in the absence of further requests by the Union" within the 10(b) period (327 F. 2d at 376). Here the Union made such further requests.[5]

[4] Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made" (Pet. App. 29a). The charge which forms the basis of this proceeding was filed and served on February 27, 1969.

[5] The Board's extension of the certification year is neither a departure from established Board policy nor contrary to the law, as petitioner suggests (Pet. 19–21). Meaningful bargaining did not begin until late in 1968, and petitioner withdrew from

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

EUGENE G. GOSLEE,
Acting General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

JULY 1971.

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bargaining in February, 1969. In the circumstances here, the Board was justified in extending the original certification for a "reasonable" period of time.

U.S. GOVERNMENT PRINTING OFFICE: 1971

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 2 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

~~No. 1885~~ 70-337

HY-LAN FURNITURE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF FOR PETITIONER IN REPLY

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IN THE

Supreme Court of the United States

October Term, 1971

No. 1885

—o—

HY-LAN FURNITURE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

—o—

BRIEF FOR PETITIONER IN REPLY

Hy-Lan Furniture, Inc. ("the Company") respectfully submits this brief in further support of its petition for a writ of certiorari to the Fourth Circuit Court of Appeals and in reply to the brief of the National Labor Relations Board ("the Board") opposing the issuance of said writ.

Introduction

The magnitude of the errors below is sharply pointed up by the Board's own brief which itself confirms that the enforcement of a bargaining order in the case at bar will have the untoward effects of:

i) forcing upon several hundred employees a union which they indisputably do not want;

ii) radically broadening the "extension of the certification year" doctrine to enable a union, after the certification year has expired, to immunize itself from the employees and thwart their wishes; and

iii) substantially eroding the absolute proscription of the National Labor Relations Act against prosecution of stale unfair labor practices.

In arguing that a writ of certiorari should not issue, it is unfortunate though perhaps unavoidable that the Board has had to ignore controlling decisions of this Court and the various Courts of Appeal; has found it necessary to tuck important legal issues into footnotes or not deal with them at all; and has set forth as "findings" numerous matters which are totally without support in the Record.

In response to the Board's Statement.

The Board's opposing brief confirms that there is no dispute as to the following facts:

1. The Company withdrew recognition of the Union 13½ months after the Union was certified. Withdrawal was based upon a written petition by 215 of 382 employees stating that they no longer wanted the Union to represent them.*

2. The Union's affidavit in support of the unfair labor practice charge contained nothing to indicate that the

* There is no evidence that any signature had been involuntarily obtained. Any such suggestion in the Board's brief (p. 5) and in the Trial Examiner's decision (A10a) is improperly based solely upon a statement by Union representative Woodall that he had been told by one Beaver that the latter had been told by an unidentified person that some employees had been promised benefits if they signed, and reprisals if they did not sign, an unidentified "paper". Obviously such hearsay reporting of non-specific hearsay has no probative force, even under the relaxed evidentiary standards of administrative hearings. *NLRB* v. *Amalgamated Meat Cutters, Local 127*, 202 F. 2d 671 (9th Cir. 1953).

Company had failed to supply any information necessary for bargaining. The affiant himself later testified that he understood that the purpose of the affidavit was "to support the charges that had been filed," and that it recited everything that had occurred except the "little details."

3. The Board's lengthy complaint contained only one reference to an alleged refusal to furnish information: in two lines of one subparagraph, it was alleged that subsequent to August 28, 1968 (the statutory cut-off date), the Company refused to furnish job classifications and wage rates.

4. Complete wage rates in fact had been furnished previously to the Union in May, 1968. As for job classifications, their establishment per the Union's own demand, was to be a subject of collective bargaining since the Company had never previously maintained such classifications. In any event, the Company furnished the Union with a complete list of job descriptions as soon as the Union indicated that this substitute information would suffice for bargaining purposes.

5. The *only* request for information subsequent to August 28, 1968 (the statutory cut-off date) was on October 31 when, in response to a *Company* inquiry, the Union asked for descriptions of the employees' jobs, pension plan information, and an updating of the previously furnished wage rates and hiring dates. The job descriptions and complete pension information were provided in full by the time the parties next met on November 25. The wage rates and hiring dates were not updated. However, the Trial Examiner specifically found that the lack of "fresh" wage data (which related to only one-third of the employees) did not impede bargaining. As for hiring dates, it is undisputed that the Union knew the precise dates for two-thirds of the employees, and knew that the remaining

one-third had all been hired within the previous few months. Thus, it must be concluded that the Union's October 31 request for information was fulfilled in every material respect within a very short period of time.

6. The Union's satisfaction with the bargaining information which it received in response to its October 31 request was evidenced by the facts that: i) at no time after the parties next met on November 25 did the Union indicate that it had received incomplete information or request any further information; and ii) a month or so later, the Union requested withdrawal of a then pending unfair labor practice complaint, itself based upon an alleged failure by the Company to supply bargaining information. The complaint was withdrawn.

7. Bargaining sessions were held throughout 1968 in February, April, May, July, September, October, November, and December. Another meeting was held in January, 1969. There is no evidence that the parties had not successfully negotiated at any of these meetings. On the contrary, it was unanimously agreed by everyone who had observed the situation—*i.e.*, the chief Union negotiator, the Company negotiator, the Trial Examiner in the prior unfair labor practice proceeding, and the Trial Examiner herein—that "substantial progress toward reaching an agreement had been made" (A8a-9a). The Trial Examiner herein described the Company's bargaining as "in good faith" (A16a). The parties reached agreement on numerous Union proposals.

8. Four days after the Company withdrew recognition based on the employees' written rejection of the Union, a formal decertification petition was filed with the Board. The petition was never entertained on the merits. Eventually it was dismissed after the Board, in the proceeding at bar, ordered the Company to continue to bargain with the minority Union.

In the face of the foregoing undisputed facts, the Board has concluded, rather remarkably, that there were "repeated refusals" subsequent to August 28, 1968 (the statutory cut-off date) to furnish information "fundamental to the bargaining process;" that "the Union was in no position to engage in meaningful negotiations;" and that the Company, despite the employees' petition, "cannot be heard to question the Union's continued majority status" (Board Br. 6-7).

Of course, not one of these conclusions may be drawn from the Record. This is demonstrated not only by the undisputed facts recited above, but also by the Board's own brief which fails to point to a single fact supporting the Board's ill-founded conclusions. Conclusory statements may not be substituted for evidence which does not exist. Nor may the Board cure the lack of evidence by emphasizing immaterial facts such as the negotiations relating to the withdrawal of the prior unfair labor practice charge (Board Br. 3-4) and the events preceding the August 28, 1968 statutory cut-off date (Board Br. 2-3). Such an approach is itself a testament to the weakness of the Board's position.

The only conclusion which may be reached on any reading of the Record is that there was no refusal and no failure at any point during the relevant period of time to supply any information necessary to bargaining. The only information request during this period—on October 31—was promptly filled in every material respect as evidenced by the admitted "substantial progress" in bargaining which occurred thereafter (A7a).

In response to the Board's Argument.

The decisions below are "pegged" upon i) an alleged refusal to provide job classification information from August 28 to October 31, 1968 (A13a), and ii) an alleged

refusal to supply wage rate and hiring date information for one-third of the employees from October 31, 1968 until February 20, 1969 when recognition was withdrawn (A14a-15a).

A careful reading of the Board's brief to this Court reveals that the Board has abandoned any attempt to justify the first finding. The Board presumably has recognized that the finding may be sustained *only* if the May, 1968 request for job classifications is somehow deemed to have been automatically continued into the post-August 28 period—a position which is untenable in view of the holdings of *Machinists' Local 1424* v. *NLRB*, 363 U.S. 411 (1960) and *NLRB* v. *Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964) which categorically reject the "continuing violation" theory as a means of avoiding the strictures of the six-month unfair labor practice statute of limitations. The simple fact is that there were no requests for job classifications from early May until October 31, at which time the Union agreed to accept job descriptions in lieu of classifications. Complete job descriptions were provided shortly thereafter.

All that is left, therefore, to support the Board's drastic order compelling the Company to bargain with a minority union after the expiration of the certification year is the finding that from October 31 to February 20, the Company failed to update the wage rate and hiring date information previously supplied in May.* The Board argues that this information "was necessary to enable it [the Union] to engage in meaningful contract negotiations." The Board then speculates that "successful bargaining" was "delayed," thereby "induc[ing] employees to withdraw from the Union" (Board Br. 7).

The argument is specious and is made possible only by the Board's belated rejection, never heretofore made, of

* The Board's complaint had alleged nothing concerning hiring date information.

the Trial Examiner's contrary findings (see Board Br., p. 7, note 3), and by the Board's further rejection of the unanimous testimony of all the witnesses and the opinions of the two Trial Examiners that the Company had bargained in good faith; that "substantial progress" was made; and that agreement was reached on many Union proposals. In view of these facts and the further fact that the Union had received complete wage rate and hiring date information in May, there is no merit to the Board's statement about "delay" in "successful bargaining" being attributed to events occurring within the six month limitations period. Such charges must be viewed as nothing more than an advocate's puffing that is without any Record support.

Nor is there any merit to the Board's claim that the employees' disenchantment with the Union was caused by the Company. The fact is that the Record is silent as to the cause of the employees' petition for decertification. The Board should not now be permitted to substitute speculation for the evidence which the Board failed to adduce at the hearing, despite its burden of proof. All that may be concluded at this stage of the proceeding is that there probably were as many reasons for the employee dissatisfaction as there were signatures on the petition. Perhaps the Union had not exhibited sufficient vigor. Perhaps the Union had done certain things which offended some of the employees. Perhaps there had been an experience at neighboring plants which caused the employees to believe that excessive union demands could be counterproductive. Perhaps the Union in its organizing campaign made promises which it was incapable of fulfilling. Irrespective of the actual reasons for the employees' change of heart, however, the fact is that the Record provides no clue as to why they decided to seek to turn out the Union. It is totally improper now to charge the Company with having been the cause of the erosion of Union support.

No amount of exaggeration can hide the plain truth that enforcement of the bargaining order below will force employees to be subjected to a bargaining representative whom they have expressly rejected. It is also true that enforcement of the bargaining order will be a judicial license permitting a union, through the device of filing an unfair labor practice charge *after* the so-called certification year has expired, to revive and extend the certification year. The result will be to immunize a labor union from its members for a period substantially longer than the one year approved in *Brooks* v. *NLRB*, 348 U.S. 96 (1954). It is startling that the Board would describe this result as "neither a departure from established Board policy nor contrary to the law" and would attempt to bury the whole issue in a footnote (Board Br. p. 8, note 5). However, the rights of employees to "self-organize" and "to bargain collectively through representatives of their own choosing" may not be so easily disregarded and so silently eroded.

The Board has phrased the issue herein to be "whether . . . the Board properly ordered the employers to continue to recognize and bargain with the union notwithstanding its loss of employee support." The answer is clear: the order was improper and should be reversed.

CONCLUSION

For the reasons set forth in this reply brief and in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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